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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURICE BURTON MURRAY,

Defendant and Appellant.

H036588

(Monterey County

Super. Ct. No. SS082950)

Defendant Maurice Burton Murray appeals from a judgment of conviction entered after a jury found him guilty of two counts of lewd acts upon a child under the age of 14 (Pen. Code, § 288, subd. (a)). The jury also found true the allegations that defendant committed the offense on more than one victim within the meaning of Penal Code section 1203.066, subdivision (a)(7). The trial court sentenced defendant to a term of 30 years to life in state prison. On appeal, defendant contends that the trial court erred in admitting evidence of prior acts of molestation and in excluding evidence that the district attorney failed to prosecute defendant in connection with these prior acts. We find no error and affirm the judgment.

I. Statement of Facts

Jessica testified that defendant had recently married her grandmother, Maria. Around Halloween 2008, when she was 11 years old, Jessica spent the night at Maria's house with her 14-year-old sister Alicia, her eight-year-old twin brothers, and two cousins, Marissa and Adriana. Her 20-year-old aunt Jasmine, defendant, and Maria were also at the house that night. The children fell asleep while watching television. Though it was dark, there was a night light in the adjoining kitchen. Jessica was wearing a tank top, jeans, and underwear.

Jessica woke up at about 1:00 a.m. to find defendant next to her. As Jessica was lying on her back, defendant rubbed around her vagina on top of her underwear for "about two minutes." Jessica tried to flip over, but defendant kept flipping her back. She also tried to wake up her cousin, Adriana, but was unable to do so. Jessica was eventually able to get on her stomach. When Jasmine exited her room to go to the bathroom, defendant got up and went towards Maria's room. Jessica was scared and wanted to cry. She thought that defendant also touched her chest while she was sleeping because the following day "it had a funky smell," the way that defendant smelled.

Before defendant touched her, Jessica would hug him only when Maria made her. She did not want to hug or kiss defendant because she did not really know him. The first person that Jessica told about the incident was Adriana. She stopped seeing Maria because of what happened to her.

Jessica also testified regarding a second incident involving her cousin, Marissa. Jessica spent the night at Maria's house sometime around Thanksgiving 2008 when defendant touched Marissa. On that night, Jessica, Marissa, Jessica's two brothers, and their cousin, Armando, were sleeping in the living room. She was sleeping on the couch while Marissa was on the floor. Jessica woke up to see defendant pull down the covers on Marissa. When he turned to see if Jessica was awake, she closed her eyes. He opened Marissa's pants and began touching her while she moved around. He touched her for a

couple minutes. When Jasmine opened the door from her room, defendant went to Maria's room. Jessica asked Marissa, "Did you feel that?" Marissa replied that she had, and Jessica told her that it was defendant. Both girls then went and told Jasmine. After Jasmine went to Maria's room, all three adults returned to Jasmine's room where they argued and cried.

Earlier on the night that defendant touched Marissa, he put lotion on Marissa's feet. He also tried to put lotion on Jessica's feet, but she told him to stop. Defendant said, "Come on," but she said, "No."

Jessica testified that the purpose of the trial was to "get [her] statement" and to "put [defendant] away." Jessica did not like defendant because she thought that Maria had married him too quickly, though she acknowledged that it was the first time that she had seen Maria "really, really happy." Jessica had slept at Maria's house 15 or 20 times, but there were only two molestation incidents. Jessica also felt "weird" around defendant because he would come to her house and try to solve her parents' problems.

Marissa was eight years old when defendant molested her at Maria's house in November 2008. At that time, she was spending the night with her cousins, including Jessica. Marissa was about to go to sleep in the living room when she saw defendant in the kitchen. He then went toward his room, but came back out and peeked through the blinds between the kitchen and the living room.

Less than five minutes later, Marissa heard someone come into the living room and she "felt like two fingers in [her] mouth . . . trying to open it." She "tried to close [her] mouth again and the two fingers left in. And [she] felt two things on [her] face." She was scared so she kept her eyes closed. Defendant touched her vagina over her pants. He also placed his hand inside her pants and touched her vagina over her underwear for 10 seconds or less. She moved onto her shoulder. After he left, she and Jessica talked. They then went and told Jasmine what had happened, and Marissa began crying. Jasmine left and returned with Maria and defendant. Defendant said that he did

not do anything, and left the room. Prior to the incident, Marissa liked defendant and got along with him.

Jasmine testified that Jessica and Marissa were her nieces and Maria was her mother. Around Thanksgiving 2008, Alicia, Jessica, Adrian, Fabian, Adriana, Marissa, and Armando were spending the night. At around 1:00 a.m. she woke up, got a blanket from Maria's room, and returned to her bedroom. About 20 minutes later, Jessica and Marissa woke her up. Jessica seemed frightened, confused, and sad while Marissa was crying. When Jasmine asked what was going on, Jessica told her that defendant was touching them. Jasmine got up and told them to explain again what had happened. After they had finished telling her what had happened, Jasmine told them to stay in her room and she went to Maria's room. Maria was asleep in her bed and defendant, who was awake, was sitting in a chair with his laptop. Jasmine woke Maria up and told her that Marissa was crying. They went to Jasmine's room, and Maria asked the girls what had happened. Defendant denied touching the girls. The girls spent the rest of the night in Jasmine's room. Jasmine admitted that she did not get along with defendant because he tended to be a "policeman" in the house and monitored her behavior.

K.G. testified that she was 30 years old. Defendant married her mother when K. was two years old, and K. lived with defendant until she was seven years old. In 1987, when K. was seven years old, her mother worked a lot and defendant did not. After her mother would leave for work, defendant would take her into his room and make her touch his penis. She touched it with her hand and sometimes he would make her put her mouth on it. Defendant also told her, "[i]f, you know, you kiss daddy down there, I'll do your homework for you." She would object, but he made her go under the table and suck his penis. While they were playing hide and seek with her sister, defendant and K. hid in the tub and defendant made her hold his penis. He also made her suck his penis "a lot of times." Defendant told her that her mother worked "really hard. And . . . she wouldn't

really want to hear this because it would really, really hurt her.” Defendant also touched her vaginal area with his fingers.

On the day that K.’s mother sent her and her three-year-old sister to live with their aunt in New York, defendant said, “You know, daddy’s really, really sorry for what he did to you, and daddy loves you.” K. never told her mother the exact details of what defendant had done. When K. spoke with police officers, she told them that defendant did certain things, but she did not remember if she told them details.

On Friday, September 3, 2010, the day after K.’s testimony, defendant failed to appear for trial. After questioning defendant’s mother outside the presence of the jury, the trial court continued the trial to Tuesday, September 7.

When defendant did not appear on September 7, the trial court heard testimony outside the presence of the jury on whether he was voluntarily absent. After hearing this evidence, the trial court found that defendant was voluntarily absent, and ruled that it would give a flight instruction.

Lucille Wheatley, defendant’s mother, testified that defendant gave her a ride to court on Friday, September 3 at about 8:40 a.m. As he was dropping her off, he told her to tell his attorney that he would be right up. At about 9:30 a.m. he called Wheatley. He was crying and he said, “I’m not going to see my mother again.” He also said, “Mommy, I’m going to go to jail,” and that he would be back on Tuesday.

Monika Reed-Buechse testified that defendant arrived at her house on September 3 in the late morning or afternoon and spent the night at her house. She gave him a ride the following morning and dropped him off down the street from the San Jose airport. He told her that he would be back on Tuesday.

II. Discussion

A. Admissibility of Uncharged Sexual Offenses

Defendant contends that the trial court committed prejudicial error when it admitted evidence of uncharged sexual offenses against his stepdaughter K.

Both the defense and the prosecution brought motions in limine regarding the admissibility of evidence under Evidence Code section 1108.¹ The motions stated: the prosecution proposed to introduce evidence that sometime between September 1986 and January 1987 defendant committed a lewd act on a child under the age of 14; the victim was defendant's seven-year-old stepdaughter, K., from a previous marriage; when they were alone together defendant made K. touch his penis, orally copulate him, and he digitally penetrated her; she told her mother, V.M., and defendant apologized to her; the incident was investigated by the police department; the district attorney did not file charges; V.M. wrote a letter in February 1987 in which she expressed doubts as to whether K. was telling the truth; and V.M., who was now defendant's ex-wife, currently claimed that K. had told the truth. Defense counsel focused his argument on the remoteness of the uncharged offenses, the lack of certainty that the offenses had been committed, and the prejudicial nature of the uncharged offenses. The trial court ruled that the evidence was admissible, finding that K. made these claims against defendant around the time of the acts, and that the acts involved minors of about the same age and occurred in defendant's home.

In general, evidence that a defendant has committed a prior offense other than the charged offense is generally inadmissible to prove his or her disposition to commit the charged offense. (§ 1101.) However, one of the exceptions to this general rule involves sex offense cases. (§ 1108.) Under section 1108,² the defendant's other acts of sex

¹ All further statutory references are to the Evidence Code.

² Section 1108 states that "in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or

offenses are admissible to prove propensity to commit the charged offense if the evidence is not inadmissible under section 352. (*People v. Loy* (2011) 52 Cal.4th 46, 60 (*Loy*).)

“‘[T]he Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101.’ (*People v. Yovanov* (1999) 69 Cal.4th 392, 405.) Or, as another court put it, ‘[t]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108.’ (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.)” (*Loy*, at p. 63.)

Section 352 provides that “[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing issues, or of misleading the jury.” In reviewing the admissibility of evidence under section 352, trial courts consider the “nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense [Citations.]” (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) On appeal, “[t]his court reviews the admissibility of evidence of prior sex offenses under an abuse of discretion standard. [Citation.] A trial court abuses its discretion when its ruling ‘falls outside the bounds of reason.’” (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969.)

The trial court's initial step was to gauge the probative value of the evidence. Defendant argues that the uncharged offenses were not similar to the charged offenses,

offenses is not made inadmissible by Section 1101, if the evidence is not made inadmissible pursuant to Section 352.” (§ 1108, subd. (a).)

and thus the evidence had little, if any, probative value. He asserts that the prior offenses involved substantial sexual conduct over an extended period when K. was alone with defendant while the charged offenses involved a single touching over clothing on each girl while she was sleeping in a room with several other children. However, in both the uncharged and charged offenses defendant had a family relationship with each girl, the girls were approximately the same age at the time of the offenses, and the offenses occurred in defendant's home while adult family members were not available to assist the girl. Moreover, though defendant performed a wider variety of acts on K., some of those acts were identical to the acts he performed on Jessica and Marissa and defendant stopped these acts when Jasmine exited her bedroom. Thus, the trial court could have reasonably concluded that evidence of the uncharged offenses was quite probative of defendant's propensity for committing the charged offenses.

The trial court's next step was to evaluate the potential for prejudice posed by evidence of the uncharged offenses. Defendant argues that the prior incidents were remote, and thus prejudicial. Though the prior conduct occurred over 20 years prior to the charged offenses, there was no evidence that defendant had access to young female relatives, who were seven to 11 years old, between the termination of the uncharged offenses and the occurrence of the charged offenses. The fact that he acted in the same fashion when given the same opportunity was indicative of a predisposition. Thus, this factor does not weigh in defendant's favor.

Defendant also argues that the uncharged offenses were significantly more inflammatory than the current offenses because they involved substantial sexual conduct on a regular basis while the present case involved a single touching. "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Here, the

uncharged sex offenses were more inflammatory than the charged offenses. However, given the similarities between the uncharged and charged offenses, we do not find the evidence unduly prejudicial, but merely the consequence of the probative value of the evidence.

Defendant also contends that since the uncharged acts did not result in criminal convictions, there was a risk that the jury might have been tempted to punish him for the uncharged acts and the jury's attention was diverted to determining whether he committed those acts. There will always be less "certainty" than there would be if there had been a conviction, and consequently an additional burden on the defendant to defend against the uncharged acts as well as a potential danger that the jury would want to convict defendant to punish him for the past offense. However, here, the jury instructions on reasonable doubt, the necessity of proof of the elements of the offenses, and the limited purpose for which the evidence of the uncharged acts was admitted counterbalanced this risk. Moreover, the jury was not likely to be confused or misled as this evidence concerned events that occurred at a different time than the charged offenses. In any event, these are just two of the relevant factors that a trial court must weigh in balancing probative value against undue prejudice.

Though defendant concedes that the amount of time consumed by K.'s testimony was not excessive, he claims that the prosecutor focused on the uncharged conduct "by injecting [K.]'s allegations into the case to emphasize [his] alleged propensity to commit sexual offenses, [which] served to confuse the jury and distract it from its focus on whether [he] engaged in unlawful acts against Jessica and Marissa." We disagree. During closing argument, the prosecutor properly discussed CALCRIM No. 1191, which informs the jury regarding the purpose for which it may use this evidence, and reviewed the facts of the present case. Defendant does not claim that the prosecutor committed misconduct in how he conducted this portion of his argument. Under these circumstances, we do not believe the jury would have been confused.

In sum, the prejudicial factors, that is, the degree of certainty that defendant committed the uncharged acts and the likelihood of distracting the jurors from their main inquiry, did not substantially outweigh the probative value of this evidence. Thus, the trial court did not abuse its discretion in admitting this evidence.³

**B. Admissibility of Evidence of District Attorney's Failure
to Prosecute Regarding K.'s Allegations**

Defendant argues that the trial court erred when it excluded evidence regarding the investigation of K.'s claims and the district attorney's failure to prosecute him.

During argument on the admissibility of the uncharged sexual conduct evidence, defense counsel pointed out that law enforcement and the Contra Costa County District Attorney's Office had investigated K.'s allegations in 1987 and no charges were filed against defendant. The prosecutor stated that V.M. was willing to testify that defendant directed her to write a letter to the district attorney's office to persuade them to drop the case and they respected her wishes. The prosecutor argued that it was unknown why the case was not prosecuted and speculated that the district attorney's office was respecting the family's wishes. Defense counsel countered that this was one possible explanation, but that the "other possible explanation is they didn't believe any of it."

During opening arguments, which were not recorded, defense counsel apparently referred to the investigation of K.'s allegations by the district attorney's office. The trial court sustained the prosecutor's objection. Outside the presence of the jury, the trial court explained its reasoning and tentatively ruled the evidence inadmissible, stating: "We don't know how thoroughly the D.A. investigated it. We don't know how

³ Defendant also contends that section 1108 violates due process by making admissible evidence of prior sexual misconduct. The California Supreme Court rejected this contention in *Falsetta, supra*, 21 Cal.4th at pp. 916-917, and that decision is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

thoroughly the police officers investigated it. We do know that the mother of the complaining witness at that time was supporting the defendant. She is now supporting the complaining witness. There are many reasons, as both counsel have argued, that it is really speculative to try to determine why charges were not filed. [¶] It could be because of change in environment 20 some years later. And so for those reasons I don't think it should come in. But also under 352 analysis it's going to be time consuming if we're going to get into the reasons why it was not charged. And it's confusing to the jury. And the undue consumption of time, the confusion to the jury is under 352." The trial court then gave counsel the opportunity to brief the issue. When counsel did not submit additional authority, the trial court confirmed its ruling excluding the evidence.

In *People v. Griffin* (1967) 66 Cal.2d 459, evidence of uncharged conduct was admitted in a murder case to show a repeated modus operandi. (*Id.* at pp. 464-465.) *Griffin* held that evidence of the defendant's acquittal of the uncharged conduct was admissible "to weaken and rebut the prosecution's evidence of the other crime." (*Id.* at p. 465.) *Griffin* reasoned that the admission of this evidence "is fair to both the prosecution and the defense by assisting the jury in its assessment of the significance of the evidence of another crime with the knowledge that at another time and place a duly constituted tribunal charged with the very issue of determining defendant's guilt or innocence of the other crime concluded that he was not guilty." (*Id.* at p. 466.)

More recently, *People v. Mullens* (2004) 119 Cal.App.4th 648 (*Mullens*) followed *Griffin*. In *Mullens*, the trial court admitted evidence of uncharged conduct under section 1108, but refused to admit evidence that the defendant had been acquitted of this conduct. (*Mullens*, at pp. 652-653.) *Mullens* held that the exclusion of the evidence was prejudicial under the *Watson*⁴ standard, and that the trial court had no discretion under section 352 to exclude the acquittal evidence under *Griffin*. (*Mullens*, at p. 669.)

⁴ *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

People v. Jenkins (1970) 3 Cal.App.3d 529 (*Jenkins*) considered the admissibility of nonprosecution evidence. In *Jenkins*, evidence of an uncharged act was admitted to show that the codefendant's act was part of a common scheme or plan, but evidence that the codefendant was not prosecuted for the prior offense was excluded. (*Id.* at p. 533.) Though *Jenkins* noted that *Griffin* involved acquittal evidence and thus was distinguishable, it concluded that *Griffin*'s rationale was applicable. (*Id.* at p. 534.) Thus, *Jenkins* held that the nonprosecution evidence was admissible, but found the error was not prejudicial. (*Id.* at p. 535.) *Jenkins* did not consider whether section 352 applied to nonprosecution evidence.

We agree with *Jenkins* to the extent that evidence of nonprosecution may be relevant in some cases. However, there are significant differences between evidence of an acquittal and evidence of a failure to prosecute. An acquittal occurs after a full trial. The trier of fact, whether the jury or the court, has had the opportunity to observe the demeanor of the witnesses and to evaluate the evidence produced by both the prosecution and the defense. When the trier of fact renders a verdict of acquittal, it is evidence that the prosecution failed to prove the defendant's guilt beyond a reasonable doubt. However, evidence of a failure to prosecute does not necessarily have the same effect. There are many reasons why a prosecutor may decline to prosecute a case: the statute of limitations may have run; witnesses are unavailable; or other problems relating to proof. Thus, when it is unclear why the decision not to prosecute was made, the trial court properly evaluates the evidence under section 352.

In the present case, as the Attorney General points out, the prosecution may have been convinced of defendant's guilt in 1987, but considered K.'s welfare or that of the family, V.M.'s hostility to the prosecution, or K.'s removal from the jurisdiction. The prosecution may also not have thoroughly investigated the case. Thus, the trial court did not abuse its discretion under section 352 in concluding that the admission of this evidence would have been unduly time-consuming as well as confusing to the jury.

Even assuming that the trial court erred in excluding the nonprosecution evidence, there was no prejudice to defendant. Here, the prosecutor made an offer of proof that V.M. was available to testify that defendant directed her to write a letter to the district attorney's office to persuade them to drop the case and they respected her wishes. She also would have testified that she believed defendant was guilty of the offenses against K. Defense counsel made no offer of proof as to why defendant was not charged. Any probative value contained in the fact that the prosecution had failed to prosecute would have thus been minimized. Based on this record, there was no reasonable possibility that the jury would have reached a different result if the nonprosecution evidence had been admitted.⁵

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Duffy, J. *

⁵ Given its minimal probative value, we also reject defendant's contention that the exclusion of this evidence deprived him of the opportunity to present a defense. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.